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**IN THE
COURT OF APPEALS OF INDIANA**

NATHANIEL DURDEN WASHPUN,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A02-0701-CR-70

APPEAL FROM THE DELAWARE CIRCUIT COURT

The Honorable Robert L. Barnett, Judge

Cause No. 18C03-0601-FD-5

June 25, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Nathaniel Durden-Washpun (Durden-Washpun), appeals the Forensic Diversion Program Judge's Order discharging him from the Delaware County Forensic Diversion Program.

We affirm.

ISSUE

Durden-Washpun raises one issue on appeal, which we restate as: Whether the State proved by a preponderance of the evidence that Durden-Washpun committed a violation sufficient to revoke his participation in the Forensic Diversion Program.

FACTS AND PROCEDURAL HISTORY

June 1, 2006, Durden-Washpun entered into a plea agreement with the State, the pertinent terms of which include:

Post Conviction Forensic Diversion Plea Agreement

* * *

5. [Durden-Washpun] agrees to plead guilty to the following charge: 18C03-0601-FD-05 – Count 1: [p]ossession of a [c]ontrolled [s]ubstance, [a] Class D felony.
6. The parties agree that [Durden-Washpun] shall receive the following sentence: . . . three (3) years with the Department of Correction executed, but stayed in accord with the terms herein:
7. Execution of said sentence shall be stayed, on condition of [Durden-Washpun's] successful completion of the Delaware County Forensic Diversion Program.
8. [Durden-Washpun] shall be released on his own recognizance, placed on supervised probation to the Delaware County Forensic Diversion Program for a period of three years, shall sign The Delaware County

Forensic Diversion Program Participation Agreement, shall sign the standard rules of probation and will be subject to immediate participation in the Forensic Diversion Program.

9. In order to successfully complete the Forensic Diversion Program, [Durden-Washpun] shall be required to actively engage in the following:
 - (a) Intensive substance abuse treatment and/or mental health counseling as required by an approved treatment provider[;]
 - (b) Close monitoring of said treatment by the Forensic Diversion Program Staff[;]
 - (c) Random urinalysis[;]
 - (d) Payment of program fees[;]
 - (e) Regular appearances before the designated Forensic Diversion Program Judge, as ordered by the [c]ourt and/or required by the Program guidelines[;]
 - (f) Obtain employment and complete high school/GED or vocational training if he has no apparent marketable job skills.
10. The Forensic Diversion Program shall be 3 years in duration and shall operate in two phases. The first 18 months of the Program (Phase I), [Durden-Washpun] shall be a participant of the Delaware County Forensic Diversion Drug Court (DCFDDC) and shall be subject to all of the rules of DCFDDC, the following 18 months of the Program (Phase II), [Durden-Washpun] shall participate in the Court Alcohol and Drug Program (CADP) and [be] subject to all of the rules of CADP. The Forensic Diversion staff shall monitor [Durden-Washpun's] progress through all stages of the Program and all Forensic Diversion defendants shall be under the supervision of the presiding Forensic Diversion Program Judge. The Forensic Diversion Program Judge may suspend any portion of Phase I or II, subject to paragraph eleven (11) below.
11. Failure of the defendant to complete the entire 2-phase program, including basic monitoring, may result in the immediate execution of [Durden-Washpun's] sentence, to be served at the Indiana Department of Correction[.]. Any major violation shall include absconding from

the program, commission of a new criminal offense, or more than three positive screens for alcohol or controlled substances. A major violation will result in a Petition [t]o Revoke being filed in the DCFDDC. At a hearing on said Petition, should the Forensic Diversion Judge determine, by a preponderance of the evidence, that there has been a major violation, [Durden-Washpun] shall be dismissed from the program and his sentence shall be executed.

(Appellant's App. pp. 59-60).

On June 8, 2006, the trial court accepted the terms of the plea agreement and sentenced Durden-Washpun to three years at the Department of Correction. The sentence was ordered stayed on the condition of successful completion of the Forensic Diversion Program. Durden-Washpun was admonished that "[a]ny violation of that program can result in dismissal from the program and execution of [the] three-year sentence." (Transcript p. 30). October 13, 2006, the State filed a Petition for Hearing on Revocation and Executed Sentence on Violation of Terms of Courts Forensic Diversion Drug Court Program indicating, "[o]n September 13, 2006, [Durden-Washpun] was charged with [b]urglary, [a] Class B felony[;] [b]urglary, [a] Class B felony[;] [t]heft, [a] Class D felony[;] and [t]heft, [a] Class D felony [Durden-Washpun] tested positive for marijuana in [] urine screens taken on June 27, July 17, and August 1, 2006 [Durden-Washpun] owes fees in the amount of \$260.00" (Appellant's App. p. 99). On December 13, 2006, a hearing was held on the State's Petition; Durden-Washpun admitted to the allegations. On December 21, 2006, the trial court ordered Durden-Washpun to serve his three-year sentence.

Durden-Washpun now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Durden-Washpun contends that he should not have been discharged from the Forensic Diversion Program merely based on the allegation of a new charge. Rather, he argues the decision to dismiss him from the program and impose his stayed sentence should be postponed until the disposition of his pending charges.

The Forensic Diversion Program is a program designed to provide adults with a mental illness and/or an addictive disorder who have not been charged with a violent offense, as defined by statute, the opportunity to receive community treatment and other services related to their mental health and/or addiction needs instead of or in addition to incarceration. I.C. § 11-12-3.7-4; *Members v. State*, 857 N.E.2d 1019, 1021 (Ind. Ct. App. 2006). I.C. § 11-12-3.7-11(c) provides, “[i]f the person has been convicted of an offense that is nonsuspendible, the court shall order the execution of the nonsuspendible sentence and stay execution of all or part of the nonsuspendible portion of the sentence pending the person’s successful participation in and successful completion of the post-conviction forensic diversion program.”

Here, the trial court sentenced Durden-Washpun to three years at the Department of Correction, but stayed the sentence on condition of successful completion of the Forensic Diversion Program. In order to revoke the stay of Durden-Washpun’s sentence, he need only fail to complete any one portion of the Participation Agreement or standard rules of probation. Additionally, Durden-Washpun was cautioned that if it was determined “by a preponderance of the evidence, that there has been a major violation, [he] shall be dismissed from the program and his sentence shall be imposed.”

(Appellant's Br. p. 60). We note that Durden-Washpun claims he should not have been discharged from the Forensic Diversion Program based solely on the allegation of a new charge. Except, that in addition to admitting to being arrested and charged for burglary and theft, our review of the record indicates Durden-Washpun admitted testing positive to marijuana three times as well. Thus, we conclude there was evidence beyond a preponderance that Durden-Washpun failed to complete the Forensic Diversion Program and his stayed sentence of three years was rightfully imposed.

CONCLUSION

Based on the foregoing, we find the State proved by a preponderance of the evidence that Durden-Washpun committed a violation sufficient to revoke his participation in the Forensic Diversion Program.

Affirmed.

NAJAM, J., and BARNES, J., concur.